No. COA23-760

NORTH CAROLINA COURT OF APPEALS

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STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION; PUBLIC STAFF – NORTH CAROLINA UTILITIES COMMISSION, Intervenor; DUKE ENERGY PROGRESS, LLC, Petitioner; and DUKE ENERGY CAROLINAS, LLC, Petitioner,

Appellees,

v.

ENVIRONMENTAL WORKING GROUP, Intervenor; 350 TRIANGLE, Intervenor; 350 CHARLOTTE, Intervenor; THE NORTH CAROLINA ALLIANCE TO PROTECT OUR PEOPLE AND THE PLACES WE LIVE, Intervenor; NC WARN, Intervenor; NORTH CAROLINA CLIMATE SOLUTIONS COALITION, Intervenor; SUNRISE MOVEMENT DURHAM HUB, Intervenor; and DONALD E. OULMAN, Intervenor,

Appellants.

From the N.C. Utilities Commission

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APPELLANTS' REPLY BRIEF

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INDEX

TABLE OF CASES AND AUTHORITIES

Cases:

Statutes:

Other Authorities:

No. COA23-760

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STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION; PUBLIC STAFF – NORTH CAROLINA UTILITIES COMMISSION, Intervenor; DUKE ENERGY PROGRESS, LLC, Petitioner; and DUKE ENERGY CAROLINAS, LLC, Petitioner,

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ENVIRONMENTAL WORKING GROUP, Intervenor; 350 TRIANGLE, Intervenor; 350 CHARLOTTE, Intervenor; THE NORTH CAROLINA ALLIANCE TO PROTECT OUR PEOPLE AND THE PLACES WE LIVE, Intervenor; NC WARN, Intervenor; NORTH CAROLINA CLIMATE SOLUTIONS COALITION, Intervenor; SUNRISE MOVEMENT DURHAM HUB, Intervenor; and DONALD E. OULMAN, Intervenor,

Appellants.

From the N.C. Utilities Commission

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APPELLANTS' REPLY BRIEF

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ARGUMENT

I. INTRODUCTION

In this thoroughly contested case, there are certain facts which are not disputed.

First, the Companies'[1] Appellee Brief did not contest—indeed, it failed to even mention—Appellants' point that the NEM Tariffs approved by the Commission will drastically reduce the value of residential rooftop solar systems statewide. *See* Appellants' Br., at pp 10-11. Indeed, Appellee Public Staff filed comments before the Commission acknowledging that the NEM tariffs proposed by the Companies could increase the average monthly bill for residential NEM customers by as much as 118.53%. (R pp 10-11).

Second, no party to the present Appeal has disputed that the Commission probably failed to consider all benefits of rooftop solar. In fact, in its Appellee Brief, the Companies could muster only the following tepid defense

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[1] The present Reply Brief uses the same shortform names as were defined in Appellants' Brief. The "Companies" and "Duke" refer to Appellees Duke Energy Carolinas, LLC and Duke Energy Progress, LLC; the "Commission" or "NCUC" refer to the N.C. Utilities Commission; the "Public Staff" refers to Appellee Public Staff – North Carolian Utilities Commission; "NEM" refers to net energy metering; the "Joint Application" refers to the Joint Application for Approval of Revised Net Energy Metering Tariffs filed by the Companies on 29 November 2021; the "NEM Order" refers to the final judgment entered by the Commission on 23 March 2023; and the "NEM Tariffs" refer to the NEM tariffs approved in the NEM Order and filed by the Companies on 3 April 2023.

of the fulsomeness of the Commission's consideration of the benefits of rooftop solar: "Importantly, the record confirms that the Rate Design Study[2] investigated the *majority* of the quantifiable benefits of customer-sited generation." *See* Duke's Br., at p 26 (emphasis in original). Note that the Companies did not say *all*, or *nearly all*, or *the vast majority*. Instead, according to the Companies' own Appellee Brief, the Commission considered merely the *majority* of the benefits of rooftop solar. Given the profoundly negative impact that all parties to this Appeal admit the NEM Tariffs will cause to rooftop solar systems statewide, the Commission should have considered more than the mere *majority* of rooftop solar benefits.

Third, in the Appellants' Brief, we characterized the Companies' position as being the following: "In short, the Companies contend that they were permitted under House Bill 589 to investigate themselves." *See* Appellants' Br., at p 19. That sounds drastic, but it is undisputedly true. The Companies' Brief stated as follows: "The record reveals the Rate Design Study fulfilled the Act's requirement for an investigation of the costs and benefits of customer-sited generation . . . ." *See* Duke's Brief, at p 23. Note that the referenced "Rate Design Study" was conducted by *the Companies*. Indeed, even the

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[2] According to the Companies' Brief, the "Rate Design Study" consists of the stakeholder process and the Embedded and Marginal Cost Study. *See* Duke's Br., at p 5. The "Rate Design Study" is the *only* study considered by the Commission.

Commission's NEM Order stated that Duke's own internal study constituted the statutorily mandatory investigation. *E.g.*, (R p 1249 ("Nothing in the plain language of the statute mandates that the investigation must be conducted by the Commission, only that an investigation take place prior to rates being established.")). In short, if the NEM Order is not reversed, then the Companies are at liberty to investigate themselves despite a statutory directive to the contrary.

Fourth, the Companies do not dispute that the NEM Tariffs completely eliminated an entire major class of NEM customers: namely, flat-rate NEM customers who pay the same rate for electricity purchased at any time of day. *See* Duke's Brief, at pp 32-35. It is difficult to square this broad, drastic elimination of flat-rate customers with the mandate of House Bill 589 that the "Commission shall establish net metering rates **under all tariff designs**." N.C. Gen. Stat. § 62-126.4(b) (emphasis added).

In the face of these undisputed facts, the NEM Order cannot stand. Indeed, the Commission, in the NEM Order, committed several reversible errors. For instance, the Commission failed to analyze what benefits should, and should not, be considered in its cost-benefit analysis of rooftop solar. Appellants offered at least two subject-matter experts on the mandatory scope of this cost-benefit analysis; but the Commission ignored this issue and, without making any findings, concluded that the Companies' analysis weighed

a sufficient number of benefits. By failing to determine *which* benefits were appropriate for evaluation, the Commission failed to make adequate findings of fact and must be reversed.

Moreover, the Commission committed legal error where it concluded that the Companies were entitled under House Bill 589 to investigate themselves. The Commission committed yet another legal error where it concluded that N.C. Gen. Stat. § 62-126.4(b) did not require a NEM tariff for flat-rate customers despite the statute's mandate that NEM be extended to "all tariff designs." Thus, under a *de novo* standard of review, the Commission should be reversed.

II. THE COMMISSION FAILED TO MAKE FINDINGS OF FACT AND CONCLUSIONS OF LAW CONCERNING WHICH BENEFITS OF NEM SOLAR SHOULD BE CONSIDERED.

Appellants presented the Commission with substantial evidence, including multiple expert reports, concerning which benefits must be considered in any cost-benefit analysis of NEM solar. Unfortunately, the Commission failed to conduct an analysis or render a conclusion concerning *which* costs and *which* benefits must be considered. (R pp 1246-55). By failing

to deliberate over this foundational issue, the Commission's NEM Order lacks necessary findings of fact, is arbitrary and capricious, and should be reversed.[3]

House Bill 589 required "an investigation of the costs **and benefits** of customer-sited generation." N.C. Gen. Stat. § 62-126.4(b). A precondition to conducting this cost-benefit analysis is ascertaining *which* costs and benefits must be considered. Without a reasoned determination of *which* costs and benefits should be considered, any cost-benefit analysis would by its very nature be arbitrary and capricious because certain costs or benefits could be selectively excluded from the analysis based on the analyst's personal tastes and interests.

For precisely these reasons, there is a standard of care which governs how a cost-benefit analysis of distributed generation (*e.g.*, NEM solar) should be conducted. Both Appellants EWG and NC WARN sponsored subject-matter

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[3] In a footnote, the Companies' Brief argued that this is not an "appropriate issue for appellate review as the Commission's Order did not specifically rule on it." *See* Duke's Br., at p 20 n.15. This argument is baseless. As discussed herein, Appellants presented at least two subject-matter experts to opine on which benefits must be considered, and Appellants presented the Commission with dozens of pages of comments on this subject. *E.g.*, (R pp 388-89, 393-94, 507-13). Moreover, Appellants' Notice of Appeal explicitly stated that the Commission failed to consider and apply the standard of care for cost-benefit analyses of distributed generation. (R p 1322). The Commission's failure to rule on this issue does not insulate the NEM Order from challenge; instead, this is *precisely* the error at issue. The Companies' argument, which Duke tellingly relegated to a short footnote, should be completely disregarded.

experts who recommended application of this standard of care.[4] (R pp 262, 399-400). EWG's expert, Karl Rábago, submitted to the Commission a report explaining that the *National Standard Practice Manual for Benefit-Cost Analysis of Distributed Energy Resources* ("NSPM-DER") "compiled best practices guidance through an intentionally inclusive process of drafting, commenting, and revising supported by a range of authors and reviews," and that the NSPM-DER involved "decades of work invested in sound BCA [*i.e.*, benefit-cost analysis]" which "yielded a consensus among leading practitioners as to the elements of best-practices BCAs." (R pp 399-400). Similarly, NC WARN's expert, Mr. Powers, submitted a report to the Commission stating that "[i]t is this Manual [*i.e.*, the NSPM-DER] that should be utilized by the Commission to evaluate the costs and benefits of NEM solar." (R p 262).

The Commission failed to address this dispute. Indeed, the Commission never analyzed or grappled in any way with the issue of exactly which benefits of NEM solar should be part of the cost-benefit analysis. (R pp 1246-55). Tellingly, the Companies' Brief never claims—indeed, it could not claim—that the Commission conducted any sort of analysis concerning the standard of care applicable to cost-benefit analyses and specifically which benefits should be

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[4] The Companies incorrectly stated that only one of Appellants' witnesses advocated for this standard of care. *See* Duke's Br., at p 20.

part of the analysis.[5] That analysis is simply absent from the NEM Order, and therefore, this Court cannot evaluate whether the Companies' Embedded and Marginal Cost Study actually weighs all of the benefits of rooftop solar.

This gap in the reasoning of the NEM Order constitutes reversible error. To facilitate appellate review, "[a]ll final orders and decisions of the Commission shall be sufficient in detail to enable the court on appeal to determine the controverted questions presented in the proceeding and shall include [] [f]indings and conclusions and the reasons or bases therefor upon all the material issues." N.C. Gen. Stat. § 62-79(a). "Failure to include all necessary findings of fact is an error of law and a basis for remand under N.C. Gen. Stat. § 62-94(b)(4) because it frustrates appellate review." *State ex rel. Utils. Comm'n v. Cooper*, 366 N.C. 484, 490-91, 739 S.E.2d 541, 545 (2013). "Evidence must support findings; findings must support conclusions; conclusions must support the judgment. Each step of the progression must be taken . . . in logical sequence; each link in the chain of reasoning must appear

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[5] The Companies incorrectly equate "summariz[ing] the evidence and comments parties submitted in the Docket" to a "fair and meticulous consideration of the records," *see* Duke's Br., at p 20, n.13, yet admit that the NEM Order "did not address Appellants' arguments that the Study did not utilize the NSPM-DER framework." *See* Duke's Br., at p 21, n.15. A summary of comments, without additional analysis, cannot amount to fair and careful consideration.

in the order itself." *State ex rel. Utils. Comm'n v. Eddleman*, 320 N.C. 344, 352, 358 S.E.2d 339, 346 (1987).

"A decision by the Commission is arbitrary and capricious if it 'lack[s] fair and careful consideration . . . ." *State ex rel. Utils. Comm'n v. Friesian Holdings, LLC*, 281 N.C. App. 391, 397, 869 S.E.2d 327, 332 (2022).

By failing to make the essential findings supported by the evidence presented about which costs and which benefits must be considered under N.C. Gen. Stat. § 62-126.4(b), the Commission failed to make all necessary findings, entered an order which is arbitrary and capricious, and therefore committed reversible error.

III. THE COMMISSION FAILED TO CONSIDER SEVERAL MATERIAL BENEFITS OF ROOFTOP SOLAR.

No party to this Appeal has yet to contest that the Commission probably did not consider all benefits of NEM solar. In Appellants' Brief, we provided the Court with a chart which summarized all of the material omissions from the Commission's analysis of the benefits of rooftop solar. *See* Appellants' Br., at p 39. In their Appellee Brief, the Companies never argued that the Commission considered *all* benefits of solar. Instead, the Companies' Brief cautiously stated that the Commission considered the "majority" of the benefits of rooftop solar. *E.g.*, Duke's Br., at p 26 ("Importantly, the record confirms that the Rate Design Study investigated the *majority* of the quantifiable

benefits of customer-sited generation." (emphasis in original)). Even the Commission was unsure about the fulsomeness of its analysis. In the NEM Order, the Commission stated that its analysis included "the majority, if not all, of the known and verifiable benefits of solar generation." (R pp 1249). In short, neither the Commission nor Appellees can affirmatively say that all of the benefits of rooftop solar were considered.

To avoid this rather obvious problem, the Companies argue that the Commission omitted the societal benefits of rooftop solar in favor of considering "the known and verifiable benefits of customer-sited generation." *See* Duke's Br., p 22. The Companies' argument fails for at least two reasons: (1) the societal benefits of rooftop solar are well-known and recognized, and indeed, the Commission has recognized these societal benefits in past orders, and furthermore, (2) there are known and verifiable non-societal benefits of rooftop solar which the Commission failed to consider.

A. Societal Benefits Are Known and Verifiable

The Companies' Appellee Brief disregards the societal benefits of solar as being amorphous and unreliable. To the contrary, the applicable standard of care, namely the NSPM-DER, requires the consideration of these societal benefits: according to Appellants' experts, any cost-benefit analysis of distributed energy under the NSPM-DER must follow a "standard five-step

process, and impacts to be considered, including utility system, customer and societal impacts." (R p 422).

These societal benefits are clearly well known because the Commission, in prior orders, has recognized them. In an Order from 31 March 2009, the Commission described the benefits of solar as potentially including "environmental benefits, create[ing] jobs, reduce[d] energy losses on the distribution and transmission systems, and provid[ing] sources of emergency power" as well as "energy independence; local job creation; reduced emissions; line loss reductions; improved voltage; diminished land use effects; lower right-of-way acquisition costs; reduced capacity, transmission and distribution costs; reduced congestion; and reduced vulnerability of the system to terrorism." (R p 375 n.7).

Moreover, subject-matter experts in the present Commission docket have experience quantifying these societal benefits of rooftop solar. For example, several of the solar interest groups that signed the MOU sponsored a report by Mr. Beach and Mr. McGuire. (R p 146). On 18 October 2013, Mr. Beach and Mr. McGuire issued a report entitled *The Benefits and Costs of Solar Generation for Electric Ratepayers in North Carolina* which valued certain societal benefits of NEM solar, including "Avoided Emissions" and other environmental and health issues. (R p 951).

Several statutes and executive orders likewise support the notion that a cost-benefit analysis of NEM solar should consider certain societal benefits, including the following:

- Governor Cooper's Executive Order No. 246 recommended that the Commission consider the federal social cost of greenhouse gas emissions in its decision-making processes, (R p 954);[6]

- Governor Cooper's Executive Order No. 80 directed the development of a Clean Energy Plan, including certain greenhouse gas emissions reduction goals, (R p 954);[7]

- The Public Utilities Act expressly declares that it is "the policy of the State of North Carolina . . . [t]o encourage and promote harmony between public utilities, their users and **the environment**," N.C. Gen. Stat. § 62-2(a)(5) (emphasis added)"; and

- House Bill 951 "requires implementation of a carbon emissions reduction plan for the State's public utilities," (R p 12).

For these reasons, and others, the Companies are incorrect that societal benefits of rooftop solar are unknown or unquantifiable. To the contrary, the applicable standard of care and public policy both require consideration of these benefits.

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[6] *Executive Order No. 246*, 7 January 2022, p 3, at https://governor.nc.gov/media/2907/open (accessed on 1 December 2023) (emphasis added).

[7] *Executive Order No. 80*, 29 October 2018, at https://governor.nc.gov/documents/files/executive-order-no-80-north-carolinas-commitment-address-climate-change-and-transition-clean-energy/open (accessed on 1 December 2023).

B. The Commission Failed to Consider Several Non-Societal Benefits

Even if the Commission was not required to consider the societal benefits of rooftop solar, the Commission nonetheless failed to consider other, non-societal benefits of rooftop solar. For example, NC WARN's expert, Mr. Powers, offered a report explaining that the Companies, and therefore the Commission, failed to consider such non-societal benefits as avoided fuel hedging, avoided ancillary services, market price reduction, and avoided renewables procurement. (R p 533-34). Therefore, it is not true that the Commission considered all non-societal benefits of rooftop solar.

Notably, the Commission's NEM Order never set out which benefits of solar must be considered, and therefore, this Court cannot evaluate whether all non-societal benefits of solar were considered. It is worth repeating, however, that the Commission itself was uncertain about whether it has captured all such benefits. *See, e.g.*, (R p 1249 (stating that the Companies analyzed "the majority, if not all, of the known and verifiable benefits of solar generation")).

IV. THE COMMISSION COMMITTED ERROR OF LAW WHEN IT CONCLUDED THAT THE COMPANIES COULD INVESTIGATE THEMSELVES.

House Bill 589 required a Commission-led cost-benefit analysis of NEM solar. The applicable statute states that "[t]he rates shall be nondiscriminatory and **established only after an investigation of the costs and benefits** of

customer-sited generation." N.C. Gen. Stat. § 62-126.4(b) (emphasis added). Appellants' Brief described how the plain language, legislative intent and statutory context of this subsection require that the investigation be led by the Commission, not the Companies. *See* Appellants' Br., at pp 14-18. Otherwise, the investigation would be tantamount to what the lead author of House Bill 589, Rep. John Szoka (R-Cumberland), characterized as the "fox in charge of the hen house." (R pp 936-37).

Yet, in their Appellee Brief, the Companies argue that they are permitted to investigate themselves. The Companies stated: "The record reveals the Rate Design Study"—*i.e.*, the study conducted by *the Companies*—"fulfilled the Act's requirement for an investigation of the costs and benefits of customer-sited generation . . . ." *See* Duke's Brief, at p 23.

Unfortunately, the NEM Order ruled that the Companies are free to investigate themselves. For instance, the NEM Order stated: "Nothing in the plain language of the statute mandates that the investigation must be conducted by the Commission, only that an investigation take place prior to rates being established." (R p 1249). As described in Appellants' Brief, this conclusion is erroneous and should be reversed.

The Companies argue, however, that the Commission's legal conclusion concerning the definition of the word "investigation" should be given deference. In support of this argument, the Companies' Appellee Brief stated as follows:

> Furthermore, with regard to administrative statutes, such as N.C. Gen. Stat. § 62-126.4, "the interpretation of the agency responsible for [its] administration" is "entitled to great consideration." *State ex rel. Utilities Comm'n v. The Pub. Staff-N. Carolina Utilities Comm'n*, 309 N.C. 195, 211-12, 306 S.E.2d 435, 444 (1983).

See Appellees' Br., at p 14.

Unfortunately, however, the Companies failed to provide the Court with the full quote from the *State ex rel. Utils. Comm'n v. The Pub. Staff-N. Carolina Util. Comm'n* case. In fact, in the sentence immediately preceding the one quoted by the Companies, the N.C. Supreme Court stated as follows: "Nevertheless, it is ultimately the duty of the courts to construe administrative statutes and they may not defer that responsibility to the agency charged with administering those statutes." *Id.* at 211-12, 306 S.E.2d at 444-45 (also stating that the agency's "interpretation is not controlling"). Further, this Court has recognized that "the weight of such [an interpretation] in a particular case will depend upon the thoroughness evident in [the agency's] consideration . . . ." *State ex rel. Utils. Comm'n v. Friesian Holdings, LLC*, 281 N.C. App. 391, 398, 869 S.E.2d 327, 333 (2022). There is no such thoroughness evident in the NEM Order.

V. THE COMMISSION COMMITTED ERROR BY ELIMINATING THE CLASS OF FLAT-RATE NEM CUSTOMERS.

The Companies do not dispute that the NEM Tariffs completely eliminated an entire major class of NEM customers: namely, flat-rate NEM customers who pay the same rate for electricity purchased at any time of day. *See* Duke's Brief, at pp 32-35. It is difficult to square this drastic elimination of flat-rate customers with the mandate of House Bill 589 that the "Commission shall establish net metering rates **under all tariff designs**." N.C. Gen. Stat. § 62-126.4(b) (emphasis added).[8]

Appellants' Brief explained that the plain language of this statute—especially the provision that NEM rates must be established "under all tariff designs"—prohibits the elimination of a major class of NEM customers, namely flat-rate customers. *See* Appellants' Br., at pp 22-26.

In response, the Companies engaged in a tortured series of arguments which, at bottom, are designed to convince the Court that the words "under all tariff designs" have no meaning. In short, the Companies claim that the words "under all tariff designs" do not mean that NEM must be offered under all tariffs, but instead, those words mean that any tariff actually approved by the Commission must ensure that the full cost-of-service is paid. (R p 695).

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[8] The full sentence states: "The Commission shall establish net metering rates under all tariff designs that ensure that the net metering retail customer pays its full fixed cost of service." N.C. Gen. Stat. § 62-126.4(b).

The fundamental problem with the Companies' argument is that, if the Companies' interpretation is correct, then N.C. Gen. Stat. § 62-126.4(b) means the same thing whether the words "under all tariff designs" are included or not included. To illustrate this point, here is what the pertinent statutory provision would state if the words "under all tariff designs" were excised:

> The Commission shall establish net metering rates [excised words here] that ensure that the net metering retail customer pays its full fixed cost of service.

The only difference between the actual statute and the above hypothetical sentence is the removal of the words "under all tariff designs," yet the above hypothetical sentence has the exact same meaning being proposed by the Companies.

But that is **not** what the statute states. Instead, N.C. Gen. Stat. § 62-126.4(b) states:

> The Commission shall establish net metering rates **under all tariff designs** that ensure that the net metering retail customer pays its full fixed cost of service.

In other words, the Companies' recommended interpretation of House Bill 589, which the Commission adopted in the NEM Order (R p 1248), reads the words "under all tariff designs" right out of the statute. In so doing, the Companies have violated "a fundamental principle of statutory interpretation that courts should evaluate a statute as a whole and . . . not construe an

individual section in a manner that renders another provision of the same statute meaningless." *Lunsford v. Mills*, 367 N.C. 618, 628, 766 S.E.2d 297, 304 (2014).

Finally, the Companies argue that "Appellants' reading of the statute is impractical" because there are 26 different rate schedules for residential, nonresidential and lighting customers. *See* Duke's Br., at p 35. This argument is a red herring and should be rejected. Appellants do not argued that every tariff, including those which never previously benefitted from NEM solar, should be extended NEM. Instead, Appellants' argument is that flat-rate customers, who were previously a major NEM class of customers, cannot be eliminated.

CONCLUSION

For the foregoing reasons, the Court of Appeals should reverse the Commission's NEM Order and remand this matter for a Commission-led investigation of the costs and benefits of NEM solar.

Respectfully submitted this the 4th day of December, 2023.

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N.C. R. App. P. 33(b) Certification:
I certify that all of the appellant parties listed below have authorized me to list their names on this document as if they had personally signed it.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 28(j) of the North Carolina Rules of Appellate Procedure, counsel for Appellants certify that the forgoing brief, which was prepared using a 13-point proportionately spaced font with serifs, does not exceed 3,750 words (excluding covers, captions, indexes, tables and authorities, counsel's signature block, certificates of service, this certificate of compliance, and appendixes) as reported by the word-processing software.

This the 4th day of December, 2023.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 4th day of December, 2023, the foregoing *Reply Brief* was served on the following parties by electronic mail to the following email addresses by agreement:

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